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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 580

KENNETH GEORGE HANAUER AND
JACK A. CRABILL,
Appellants,

v.

WILSON H. ELKINS, PRESIDENT OF THE
UNIVERSITY OF MARYLAND, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS AND SUPPORTING BRIEF

C. FERDINAND SYBERT,
Attorney General,

CLAYTON A. DIETRICH,
Assistant Attorney General,
1201 Mathieson Building,
Baltimore 2, Maryland,
Counsel for Appellees

The Daily Record Co., Baltimore 3, Md.

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS

The Appellees in the above entitled case move to dismiss on the ground that the questions presented do not present a substantial federal question.

SUPPORTING BRIEF

This brief is submitted in support of the aforegoing Motion to Dismiss.

STATEMENT OF THE CASE

This is an appeal pursuant to 28 U.S.C.A. Section 1257(2) by the Appellants Hanauer and Crabill from the affirmance by the Court of Appeals of Maryland of the denial of a Writ

of Mandamus to the President and the Board of Regents of the University of Maryland to admit the Appellants to the University without conforming to the general requirement that all able-bodied male undergraduates take basic military training on the basis that the Appellants are conscientious objectors.

STATEMENT OF THE FACTS

The Appellant Hanauer was inadvertently admitted by a faculty representative of the University of Maryland as a third year student for the first semester, September 1956, without enrolling him in the basic course of miltary training as required by the rules of the University. After admission Hanauer brought the matter to the attention of the University officials who advised him that he must either enroll in basic military training at the end of the first semester or withdraw from the University. During the last month of the first semester Hanauer filed a Petition for a Writ of Mandamus in the Circuit Court for Prince George's County seeking to continue in the University without enrolling in the basic course of military instruction provided by the Air Force Reserve Officers Training Corps. Appellant Crabill actually enrolled and took the first semester of basic military instruction under written protest.

ARGUMENT

There is no substantial federal question presented in the Appellants' Jurisdictional Statement. This Court so held by summary dismissal in *Coale v. Pearson*, 290 U.S. 597. *Hamilton v. University of California*, 293 U.S. 245 settled the right of a state university to deny admittance to a conscientious objector who refused to comply with a general requirement of basic military instruction for able-bodied male students. The students in both the *Coale* case and

the *Hamilton* case, *supra*, raised the numerous allegations of the infringement of constitutional rights presented by the Appellants. The precise contentions were raised and discounted by this Court in the *Hamilton* case.

> "The allegations of the petition do not mean that California has divested itself of any part of its power solely to determine what military training shall be offered or required at the university (page 258).
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> * * * * * *
>
> "Nor is the allegation that the courses are prescribed by the War Department to be taken literally. We take judicial notice of the long-established voluntary co-operation between federal and state authorities in respect of the military instruction given in the land grant colleges. The War Department has not been empowered to determine or in any manner to prescribe the military instruction in these institutions. The furnishing of officers, men and equipment conditioned upon the giving of courses and the imposing of discipline deemed appropriate, recommended or approved by the Department does not support the suggestion that the training is not exclusively prescribed and given under the authority of the State (pages 259-260).
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> * * * * * *
>
> "Undoubtedly every State has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States army or in state militia (always liable to be called forth by federal authority to execute the laws of the Union, suppress insurrection or repel invasion, * * *) or as members of local constabulary forces or as officers needed effectively to police the State. And, when made possible by the national government, the State in order more effectively to teach and train its citizens for these and like purposes may avail itself of the services of officers and equipment belonging to the military establishment of the United States (page 260).
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> * * * * * *

> "They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and miltary education" (page 262).

The Court held this proposition untenable.

> "Plainly there is no ground for the contention that the regents' order, requiring able-bodied male students under the age of twenty-four as a condition of their enrollment to take the prescribed instruction in military science and tactics, transgresses any constitutional right asserted by these appellants" (page 265).

Judge Cardozo, concurring, "to say an extra word", observed:

> "Instruction in military science is not instruction in the practice or tenets of a religion (page 266).
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> * * * * * *
>
> "The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle — which may turn out in the end to be a delusion or an error — does not prove by his martyrdom that he had kept within the law" (page 268).

The Appellants seek to minimize the controlling effect of those two decisions by quoting and referring to decisions in other fields. They place great emphasis on this Court's reversal of position in construing the naturalization statute. *United States v. Schwimmer*, 279 U.S. 644; *United States v. Macintosh*, 283 U.S. 605; *Girouard v. United States*, 328 U.S. 61; and *Cohenstaedt v. Immigration and Naturalization*

Service, 339 U.S. 901. Although the dictum in those cases may be fascinating to the Appellants, nevertheless, in the words of Justice Douglas:

> "The Schwimmer, Macintosh and Bland Cases involved, as does the present one, a question of statutory construction." *Girouard v. United States*, 328 U.S. 61, 63 *supra.*

The cases of racial segregation in schools are of little assistance here. *University of Maryland v. Murray*, 169 Md. 478; *Sipuel v. University of Oklahoma*, 332 U.S. 631; *Brown v. Board of Education of Topeka*, 347 U.S. 483; *Bolling v. Sharpe*, 347 U.S. 497; *Frasier v. Board of Trustes*, 134 Fed. Sup. 589, affirmed *per curiam*, 350 U.S. 979; and *Adams v. Lucy*, 228 Fed. 2d 619. Even further afield are cases involving the right to hold religious services in parks (*Niemotko v. Maryland*, 340 U.S. 268 and *Fowler v. Rhode Island*, 345 U.S. 67) and suits to restrain schools from permitting religious training during school hours (*Illinois v. Board of Education*, 333 U.S. 203 and *Zorach v. Clauson*, 343 U.S. 306). *Everson v. Board of Education*, 330 U.S. 1, involved the legality of a State's reimbursing parents for transportation of children to a parochial school. Cases involving the right of a state to require students in a compulsory education system to salute the flag has little relevance to the right of a university, where attendance is non-compulsory, to require basic military training. Compare, *Minersville School District v. Gobitis*, 310 U.S. 586 and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624. This Court in the *West Virginia State Board of Education* case, *supra*, distinguished the *Hamilton* case on the basis that attendance at the university was not compulsory and reaffirmed that the

> "State has power to raise militia and impose the duties of service therein upon its citizens" (page 632).

This power of the state has been long recognized by the Supreme Court. Compare Justice Harlan's statements in *Jacobson v. Mass.*, 197 U.S. 11, 29:

> "* * * yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interest, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense."

If this were a question of initial impression the dictum in other civil rights matters may give some guidance to the Court. Here the question raised by the Appellants has been decided adverse to their contention, by this Court for almost a quarter of a century. The contentions they raise were raised in the earlier adjudications. The *Hamilton* case has been cited many times throughout the years by this Court without criticism or unfavorable reflection. It was cited with apparent approval in 1952 when the Court affirmed the action of the Supreme Court of Illinois in denying a conscientious objector admittance as an attorney-at-law solely on the basis that he would be unable to comply with the state law which made all able-bodied males members of the state militia. Compare Sections 1 and 5, Article 65, Annotated Code of Maryland (1957 Ed.). That decision was not affected by the current draft law which grants limited exemption to conscientious objectors. *Re Summers*, 325 U.S. 561, 572. The Appellants' speculative hope that this Court will reverse itself is succinctly stated on page 14, Appellants' Jurisdictional Statement "And in light of this Court's reinterpretation of the Federal Constitution * * *".

It has long been recognized that any exemption from military duty which Congress may grant is a matter of grace and not a matter of constitutional right. The Courts will not extend the special privilege granted by Congress

and will firmly establish its limits. A conscientious objector cannot subjectively establish his rights. The Court of Appeals for the Ninth Circuit carefully analyzed the conscientious objector's privilege in affirming a conviction of a conscientious objector, *George v. United States*, 196 Fed. 2d 445, *cert. den.* 344 U.S. 843. Congress has given a restricted privilege to the conscientious objector in the draft law as a shield. These Appellants have attempted to take that shield and mold it into a sword. What has been given to the Appellants as a matter of grace by the Congress they have attempted to use against the University of Maryland to demand special exemption. The Appellants seek to use the Writ of Mandamus to obtain from the judiciary a privilege which must be given by the Legislature.

In the Universal Military Training and Service Act, the Congress, as a matter of grace, has permitted the conscientious objector to take private social work in lieu of federal military training. Nowhere in the Act is the conscientious objector granted a universal exemption or exception from other civil or military obligations. The privilege granted the conscientious objector is expressly limited to the draft law. Attention is invited to the first sentence of the subsection which grants draft exemption to the conscientious objectors:

> "Nothing contained *in this title* shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." (Italics supplied.) (50 U.S.C.A. App. Section 456(j)).

The Appellants' apparent reasoning is that since Congress has granted a special exemption to conscientious objectors from the military training requirements of the draft law, therefore the states have lost their right to require military

training of their own citizens. Whether Congress could do this as a matter of constitutional right is doubtful. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 652. It is unnecessary to consider the constitutional limitations on the right of Congress to prevent a state or its agency from training its own citizens for military duty, since there is nothing in the draft law which either requires or implies this construction.

The Appellants propose to extend the limited exemption from military conscription which was granted to conscientious objectors by Congress under the Universal Military Training and Service Act of 1948, to a general exemption from all military duty to either the State or the Nation as a matter of constitutional right. This Court has held there is no constitutional privilege in the *Hamilton* case, *supra*. Congress in recodifying Title 10 granted no exemption from compulsory AFROTC to conscientious objectors. Compare 10 U.S.C.A. Section 9382 (Act of August 10, 1956, Public Law 1028, Chapter 1041) which the Appellants quoted in part as a footnote on page 11 of their Jurisdictional Statement. It is interesting to read the whole sub section (3):

> "(c) No unit may be established or maintained at an institution, unless—
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> * * * * * *
>
> (3) the authorities of the institution, other than a State university or a State institution required to provide military instruction under section 304 of title 37, agree to establish and maintain a two years' elective or compulsory course of military training as a minimum for its physically fit male students the completion of which is a prerequisite for the graduation of any student beginning the course unless he is relieved of this obligation under regulations prescribed by the Secretary."

If Congress had intended an exemption for conscientious objectors from AFROTC, why was no exemption noted in the statute which was to control the establishment and management of AFROTC units from a federal viewpoint? Particularly, after the decision in *Hamilton v. University of California, supra*.

The Appellant Hanauer in the trial court recognized that he was not entitled to the benefits of the G. I. Bill of Rights (Service-men's Readjustment Act of 1944, 38 U.S.C.A., Chapters 11C, 12A and 14) although he was quick to assert a belief that private civil work should entitle him to that benefit also. If Congress had intended the exemption contained in Section 456(j) to extend beyond that sub-title and to make social work the equivalent of military training for all purposes, Hanauer would have some color of validity given to his claim to benefits under the G. I. Bill of Rights. If substitute service is not sufficient for federal G. I. Bill benefits, it is not fair to assert that it is a substitute for a state's requirement of military training for its own citizens.

The draft law exemption for conscientious objectors does not include a person whose objection is merely a matter of personal philosophy. 50 U.S.C.A. App. Section 456(j):

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

In the trial court Hanauer testified that his objection was not based on the tenets of his religious denomination, but was a matter of personal code and personal philosophy. Even though Hanauer has previously qualified for a conscientious objector's exemption, it is possible that, in light

of his assertion under oath, he no longer meets the requirements of the draft law. It is not necessary to view this aspect of the Appellant's sincerity since the draft law by virtue of its own restrictive language does not affect a state's right to training its own citizens.

The essential difference between the *Hanauer* case and the *Crabill* case is that the latter actually took basic military training his first semester, even though under protest. This would not only impugn Crabill's basic sincerity, but would amount to waiver.

CONCLUSION

The Appellants, as alleged conscientious objectors, are not entitled to special exemption from the general rule of the state university that all able-bodied male undergraduates successfully complete basic military training as a requirement for graduation. This question was decided by this Court in *Hamilton v. University of California.* The curriculum is a matter within the sole discretion of the governing board of the university. The draft law does not attempt to give conscientious objectors any rights beyond an exemption from military training under that law. The Appellants have fully litigated their claim in the State courts and have failed to present a substantial federal question to this Court. The motion to dismiss this appeal should be granted.

Respectfully submitted,

C. FERDINAND SYBERT,
Attorney General,

CLAYTON A. DIETRICH,
Assistant Attorney General,
Counsel for Appellees.